Supreme Court, U.S.
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NO. 01392

IN THE
SUPREME COURT OF THE UNITED STATES

CHERIE SHIPP, JERRY GATES

Petitioners

VERSUS

ROYCE L. MCMAHON, Sheriff of Webster Parish, Louisiana; Webster Parish Deputy Sheriffs STEVE CROPPER and BETTY SHIPP, and THEODORE RISER, JR., Sheriff of Webster Parish, Louisiana

Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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109 pp

QUESTIONS PRESENTED FOR REVIEW

1.

May a circuit court disregard "a consensus of cases of persuasive authority," *Wilson v. Layne*, 526 U.S. 603, 617 (1999), from other circuits in ascertaining clearly established law for purposes of qualified immunity?

2.

Was it clearly established in 1996 that law enforcement officers could not refuse to protect a woman from domestic violence because of her gender?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices vi

Opinion Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 5

I. May a circuit court disregard "A consensus of cases of persuasive authority," *Wilson v. Layne*, 526 U.S. 603, 617 (1999), from other circuits in ascertaining clearly established law for purposes of qualified immunity? 5

II. Was it clearly established in 1996 that law enforcement officers could not refuse to protect a woman from domestic violence because of her gender? 9

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Cases:

Anaya v. Crossroads Managed Care Systems, Inc.,
195 F.3d 584 (10th Cir. 1999) 7

Anderson v. Creighton,
483 U.S. 635 (1987) 11

Balistreri v. Pacifica Police Dept.,
901 F.2d 696 (9th Cir. 1990) 5

Burgess v. Lowery,
201 F.3d 942, 944 (7th Cir. 2000), *cert. denied*,
121 S.Ct. 25(2000) 7, 8

DeShaney v. Winnebago County Dept. of Social Servs.,
489 U.S. 189 (1989) 9

Eagleston v. Guido,
41 F.3d 865 (2d Cir. 1994) 5

Hakken v. Washtenaw,
901 F. Supp. 1245 (E.D. Mich. 1995) 6

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 7

Hynson v. City of Chester,
864 F.2d 1026 (3d Cir. 1988) 5, 10

McDonald v. City of Chicago,
No. 94 C 3623, 1994 WL 732865, *3
(N.D. Ill. Dec. 23, 1994) 6

McKee v. City of Rockwall,
877 F.2d 409 (5th Cir. 1989) 6, 10, 11

Monell v. Department of Social Servs.,
436 U.S. 658 (1978) 9

Monroe v. Pape,
365 U.S. 167 (1961) 9

Norfleet v. Arkansas Dept. of Human Servs.,
989 F.2d 289 (8th Cir. 1993) 7

Ohio Civil Serv. Employees Ass'n v. Seiter,
858 F.2d 1171 (6th Cir. 1988) 7

Procunier v. Navarette,
434 U.S. 555 (1978) 6, 7

Reed v. Reed,
404 U.S. 71 (1971) 10

Ricketts v. City of Columbia,
36 F.3d 775 (8th Cir. 1994) 5

Shipp v. McMahon,
199 F.3d 256 (5th Cir. 2000) 2, 10

Soto v. Flores,
103 F.3d 1056 (1st Cir. 1997) 5

Tribble v. Gardner,
860 F.2d 321 (9th Cir. 1988) 7

Varrone v. Bilotti,
123 F.3d 75 (2d Cir. 1997) 7

Watson v. City of Kansas City,
857 F.2d 690 (10th Cir. 1988) 6

Wilson v. Layne,
526 U.S. 603 (1999) 1, 2, 5, 7

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 9

Statutes:

Fed. R.Civ.P. 12(b)(6) 2, 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 1343(a)(3) and (4) 2

42 U.S.C. § 1983 ..... 2, 4, 10

United States Constitution:

Fourth Amendment 1, 2

Fourteenth Amendment 9

TABLE OF APPENDICES

Page

Appendix A - Report and Recommendation of the United States Magistrate Entered January 5, 1998, Filed January 6, 1998 ..... App. 1-19

Appendix B - Memorandum Ruling and Order of the United States District Court Entered March 26, 1998, Filed March 17, 1998 ..... App. 20-30

Appendix C - Plaintiffs' Second Amended Complaint Filed May 13, 1998 .. App. 31-51

Appendix D - Report and Recommendation of the United States Magistrate Entered September 21, 1998 .... App. 52-54

Appendix E - Order of the United States District Court Entered November 2, 1998 .. App. 55

Appendix F - Order of the United States District Court Entered May 15, 1998 ..... App. 56

Appendix G - Defendants' Notice of Appeal Filed November 25, 1998 ..... App. 57-58

Appendix H - Opinion (original) of the United States Court of Appeals for the Fifth Circuit Affirming District Court's Ruling Entered January 7, 2000 ..... App. 59-71

Appendix I - Opinion (substitute) of the United States Court of Appeals for the Fifth Circuit Granting Petition for Rehearing Entered December 5, 2000 ..... App. 72-90

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Cherie Shipp, respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on December 5, 2000.

OPINION BELOW

The (substitute) Opinion of the United States Court of Appeals for the Fifth Circuit, entered on December 5, 2000, is reprinted in the Appendix to this Petition at App. I.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its original Opinion (App. H) on January 7, 2000. Pursuant to petition for rehearing *en banc* filed January 21, 2000, panel rehearing was granted and the substitute Opinion (App. I) entered on December 5, 2000.

This Court has jurisdiction to review the judgment of the United States Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment of the United States Constitution.

Fourth Amendment of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

This petition seeks review of a dismissal under Fed. R. Civ. P. 12(b)(6) on the basis of qualified immunity. The district court, which had jurisdiction of this civil rights action under 28 U.S.C.§§1331 and 1343(a)(3) and (4), denied the motion to dismiss and the circuit court affirmed. *Shipp v. McMahon*, 199 F.3d 256 (5th Cir. 2000) (App. H). Eleven months later, however, on reconsideration, the circuit court reversed itself and the court below, 234 F.3d 907 (5th Cir. 2000) (App. I). The following facts are taken from the circuit court's opinion.

Plaintiff Cherie Shipp was involved in an abusive marriage with her husband, Dalton Shipp. In late October, 1995, she tried to escape by moving to her sister's house, but Dalton found her, subjected her to threatening phone calls and on several occasions drove by her sister's home. Ms. Shipp reported these incidents to Webster Parish Sheriff's deputies, including defendant Steve Cropper, but Cropper refused to do anything.

Ms. Shipp moved to her cousin's house, but her husband found her again. This time, he beat her with a telephone and hit her with his fist. Ms. Shipp again reported the abuse to Deputy Cropper, who took a report but did not make an arrest. Instead, Dalton was allowed to turn himself in on misdemeanor charges arising from the incident, to which he pled guilty. The Court ordered counseling, and set sentencing for a later date. As a condition of bail, it ordered Dalton to stay away from his wife. Ms. Shipp also obtained a temporary restraining order prohibiting her husband from any contact with her.

Dalton then violated the TRO and the bail condition with several abusive and threatening phone calls, which Ms. Shipp reported to the Webster Parish Sheriff's Office. Again, she was told nothing could be done. Still, Dalton was not arrested.

When Dalton failed to appear in court for sentencing, a Bench Warrant was issued for his arrest. Although he appeared thereafter in court to answer other unrelated criminal charges, the deputies nonetheless failed to arrest him on the Bench Warrant.

Ms. Shipp moved to another sister's residence, but Dalton tracked her down during the late evening hours of May 19, 1996. He convinced her to get into his car to talk to him. But as soon as she did, Dalton sped away and drove her to a

house that he had leased. Ms. Shipp's family notified the WPSO. Betty Shipp, Dalton's mother and a WPSO dispatcher, received the call and hung up before inquiring into the particulars. Dalton's mother told Deputy Cropper, but again, Cropper chose to take no action.

Ms. Shipp's mother called the Minden Police Department next, which dispatched an emergency alert and radioed the WPSO. Ms. Shipp's father, Jerry Gates, found Deputy Cropper at the courthouse, and denounced his inaction. Gates said he was going to Dalton's house himself, and Cropper and another deputy pursued him.

When the deputies, including Cropper, arrived at Dalton's house, they made no effort to enter the house. Rather, they knocked on the door, explaining that they had to ascertain whether Ms. Shipp was voluntarily in the house with Dalton. A shot then rang out from the house. The deputies retreated to their vehicles for armored vests, and another shot rang out as the deputies crouched behind their cars. Inside the house, Dalton had raped his wife and shot her in the chest with a 12-gauge shotgun, afterwards turning the gun on himself. Ms. Shipp staggered to the door, holding her entrails in her hands.

Ms. Shipp survived but required emergency surgery, rehabilitation, therapy and more surgery. Dalton survived as well, and was charged with aggravated rape, aggravated kidnaping, and attempted second degree murder. The WPSO took no disciplinary action against any deputy.

Ms. Shipp brought this § 1983 action against the Webster Parish Sheriff and deputies Steve Cropper and Betty Shipp, asserting due process, equal protection and state tort law claims. On the recommendation of the magistrate (App. A), the district court dismissed all federal claims except the equal protection claim and the failure to train claim under Fed.R.Civ.P 12(b)(6) (App. B), and ordered Ms. Shipp to file a

reply to the defendant deputies' assertion of qualified immunity. Ms. Shipp did so, alleging *inter alia*, overtly discriminatory statements by the Sheriff regarding women in domestic violence matters, Second Amended Complaint, ¶46A (App. C), and the magistrate recommended (App. D) and the district court found that she had pled with sufficient particularity (App. E) and denied defendants' motion to dismiss (App. F). The defendants appealed (App. G).

REASONS FOR GRANTING THE WRIT

I. MAY A CIRCUIT COURT DISREGARD "A CONSENSUS OF CASES OF PERSUASIVE AUTHORITY," *WILSON V. LAYNE*, 526 U.S. 603, 617 (1999), FROM OTHER CIRCUITS IN ASCERTAINING CLEARLY ESTABLISHED LAW FOR PURPOSES OF QUALIFIED IMMUNITY?

Ms. Shipp contends that the defendant law enforcement officers refused to protect her from domestic violence because she is a woman. Six circuits have recognized an equal protection claim for discriminatory failure to protect from domestic violence, five of them before the events of which Ms. Shipp complains: *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988); *Ricketts v. City of Columbia*, 36 F.3d 775, 778 (8th Cir. 1994); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990); *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988). In addition, several district courts have recognized the claim. *See, e.g., McDonald v. City of Chicago*, No. 94 C 3623, 3624, 1994 WL 732865, at *3 (N.D. I11. Dec.23, 1994); *Hakken v. Washtenaw*, 901 F. Supp. 1245, 1251-53 (E.D. Mich. 1995). To plaintiff's knowledge, no circuit has rejected the

claim. Nevertheless, the circuit court held that Ms. Shipp had not asserted a clearly established right.

The circuit court granted qualified immunity because it refused to consider precedent from other circuits. 234 F.3d at 915. The court was aware of the unbroken line of cases from other circuits. But it ignored them because, "in determining whether a right is clearly established, we are confined to precedent from our circuit or the Supreme Court." *Id.* The Fifth Circuit had not yet had occasion to decide the precise question of whether a gender-based discrimination in the form of failure to protect victims of domestic violence violated the Equal Protection Clause.[1] Accordingly, it dismissed Ms. Shipp's claim. This tunnel-vision approach to ascertaining clearly established law conflicts with the approach of six other circuits, which consider decisions of sister jurisdictions. This Court should grant certiorari to resolve the conflict among the circuits.

This Court has never decided the parameters of "clearly established law" in the qualified immunity context, although it has suggested that the analysis is not confined to cases from the forum circuit. In *Procunier v. Navarette*, 434 U.S. 555, 565 (1978), the Court deferred the question by finding that the right asserted was not clearly established, "whether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court." In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982), it again deferred the issue, citing *Procunier*. Recently, in *Wilson v. Layne*, 526 U.S. 603, 617 (1999), the Court indicated that the proper referent included cases both inside and outside the circuit in which the case arose. Finding qualified immunity in

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[1] The only Fifth Circuit case in which the issue arose was disposed of on summary judgment for lack of proof of disparate treatment. *McKee v. City of Rockwall*, 877 F.2d 409, 414-16 (5th Cir. 1989).

the case at bar, the Court observed:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the right on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were unlawful. *Id.*

In the absence of a Supreme Court decision, the majority of circuits do not limit themselves to their own precedents in ascertaining clearly established law. *See Varrone v. Bilotti*, 123 F.3d 75, 78 (2d Cir. 1997); *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988); *Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000) *cert. denied*, 121 S.Ct. 25(2000); *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993); *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988); *Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 594 (10th Cir. 1999). These circuits vary in how much weight they give decisions from other jurisdictions. The Sixth Circuit will rely on decisions of other courts only in the extraordinary case, where those decisions "leave no doubt" of the illegality of the defendant's conduct, *Ohio Civil Serv. Employees Ass'n*, 995 F.2d at 1177, while the Ninth Circuit routinely charges government officials with knowledge of constitutional developments from all available decisional law, *Tribble*, 860 F.2d at 324. But none confines itself to the narrow restrictions adopted by the Fifth Circuit.

There are two problems with the Fifth Circuit's approach. First, it does not accurately indicate when a reasonable law enforcement officer would know that he is doing something unlawful. As Chief Judge Posner observed in *Burgess v. Lowery, supra*, there might be no prior decision in this Court or in the forum circuit "because the existence of the right was so clear ... that no one thought it worth while to

litigate the issue." *Id.* at 945. In other cases, a series of decisions by sister circuits would make the right clear in the forum, particularly if there were no contrary authority, as here.

Second, the Fifth Circuit's extreme approach tends to freeze the law.

> To rule that until the Supreme Court has spoken, no right of litigants in [the forum] circuit can be deemed established before [the forum has] decided the issue would discourage anyone from being the first to bring a damages suit in [the forum]; he would be certain to be unable to obtain any damages. *Id.*

As a result, the normal interchange by which differences among the circuits resolve themselves would be interrupted, and this Court would have to step in more frequently to unify the law.

To resolve a conflict among the circuits and to avoid the detrimental effects of the Fifth Circuit approach, this Court should grant certiorari and decide how clearly established law is to be determined in the qualified immunity analysis.

II. WAS IT CLEARLY ESTABLISHED IN 1996 THAT LAW ENFORCEMENT OFFICERS COULD NOT REFUSE TO PROTECT A WOMAN FROM DOMESTIC VIOLENCE BECAUSE OF HER GENDER?

Ms. Shipp complains of defendants' failure to respond to her domestic violence complaints because of "their discriminatory intent to treat female victims of domestic violence ... differently than similarly situated males." Second Amended Complaint, ¶38; *see also* ¶37 (App. C). That is a straightforward claim of discriminatory enforcement of the

laws, which this Court has recognized as violative of the Equal Protection Clause since *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). In *Yick Wo*, the Court held that a municipality could not selectively enforce an ordinance prohibiting operation of a laundry in wood structures against persons of Chinese origins. Similarly here, the defendant deputies may not selectively deny protective services to women. Indeed, the law in that regard is so clearly established that this Court needed only to drop a footnote in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 197 n.3 (1989), to remind that, although the State had no affirmative duty to protect, it could "not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."

Discriminatory provision of law enforcement protection from private violence has been at the core of the concerns underlying the Fourteenth Amendment since its inception. The floor debates of Reconstruction-era Congress are replete with denunciations of the unwillingness of state officials to protect the newly freed slaves from Ku Klux Klan violence. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 173-78 (1961)(quoting remark of Reps. Lowe, Beatty, Burchard, and Hoar), overruled on other grounds, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Congress enacted the Civil Rights Act of 1871, now 42 U.S.C. §1983, to bring the force of the Equal Protection Clause to bear on the situation. *Id.* In light of this history, Ms. Shipp's challenge to the defendants' discriminatory refusal to protect her from her husband's violence is hardly novel.

Likewise, the impermissible nature of the invidious intent asserted by Ms. Shipp is long settled. Ms. Shipp claims discrimination on the basis of her sex. At least since *Reed v. Reed*, 404 U.S. 71 (1971), the law has been clearly established that women as a class are protected against discrimination, and that disparate treatment motivated by antipathy towards women or outdated gender stereotypes violate equal protection.

This is not a case alleging discrimination because of animus against domestic violence complaints. That would assert a new right. *See Hynson v. City of Chester*, 864 F.2d 1026, 1031 (3d Cir. 1988). This is a claim of discrimination because of gender. Proof of intent to discriminate against women is one element of the claim. 234 F.3d at 914. There is nothing novel about a claim of gender discrimination.

The circuit court decided to the contrary because, among other errors,[2] it required too specific a level of factual similarity in prior cases. By so doing, it upset the balance that this Court struck in *Anderson v. Creighton*, 483 U.S. 635 (1987), between the individual interest in vindication of constitutional rights, and the government official's interest in immunity. *Anderson*

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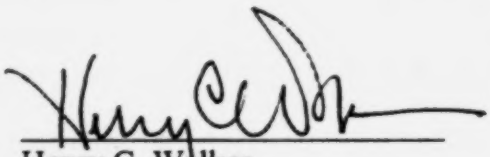
[2] The circuit court also misapplied the only Fifth Circuit decision to address a complaint of failure to respond to domestic violence complaints: *McKee v. City of Rockwall*, 877 F.2d 409 (5th Cir. 1989). (The *McKee* court granted summary judgment for the defendants because the plaintiff offered no evidence of disparate treatment.) In its initial opinion in *Shipp*, the circuit court correctly cited *McKee* as authority for a claim that "the non-arrest was the result of discrimination against a protected class." 199 F.3d at 262 (citing *McKee*, 877 F.2d at 414). That is the gravamen of Ms. Shipp's complaint. But on rehearing, the circuit court incorrectly cited *McKee* to establish lack of authority for Ms. Shipp's claim. 234 F.3d at 915. It did this by focusing on the question that *McKee* left open: whether a policy discriminating against domestic violence victims *per se* violates the Equal Protection Clause. 234 F.3d at 912 (citing *McKee*, 877 F.2d at 416). That question is not presented by this case. Intent to discriminate against women is an independent element of Ms. Shipp's claim, which she will prove by refusal to respond to domestic violence complaints by women *and other evidence*.

requires a level of factual specificity sufficient to determine whether a reasonable government official would know that his conduct is unlawful. It is not enough to ask whether the unlawfulness of violating the equal protection clause is clearly established, because the answer would always be "yes." *Id.* at 639-40. Conversely, a requirement of precedent with identical facts would eviscerate constitutional protections because it would rarely, if ever, be satisfied. *See Id.* This Court's precedents have long established that a law enforcement officer could not deny protective services on the basis of a minority status such as race or gender. That is sufficient for a reasonable deputy to know that refusal to respond to domestic violence complaints because the victim was a woman is unlawful. *Anderson* requires no more, and the circuit court erred in holding that it did. This Court should grant certiorari to restore the correct balance between official immunity and vindication of constitutional rights, and to reaffirm one of the principal purposes of the Equal Protection Clause.

CONCLUSION

For the reasons set forth above, plaintiff Cherie Shipp requests that a writ of certiorari issue.



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